

JCT 2016 – what's changed?

The Joint Contracts Tribunal (JCT) is currently rolling out the latest major update to its family of standard form construction contracts. We provide a review of the changes that have been introduced to date.

The staged publications have so far included updates to the Minor Works Building Contract (MWBC), the Design and Build Contract (DBC) and the Standard Building Contract (SBC). In this article, we will collectively refer to these as the 2016 Contracts.

Common features

Overview

A number of new features are common to all the 2016 Contracts. These include:

- Incorporation of the provisions of the JCT Public Sector Supplement 2011 that relate to fair payment, transparency and business information modelling (BIM).
- Adjustments to reflect the Construction (Design and Management) Regulations 2015 and the Public Contracts Regulations 2015.
- Amendments to the works to existing structures insurance provisions (Option C) to make them more flexible.
- Revision and simplification of the section 4 payment provisions, including:
 - Establishing 'Interim Valuation Dates' (IVDs) that apply throughout the supply chain.
 - Increasing flexibility in the fluctuations provisions.
 - Consolidating the notice provisions required by statute.
- Introduction of a procedure for prompt assessment of loss and expense claims.
- Inclusion of provisions for the grant of performance bonds and parent company guarantees.
- Extending the option to subcontractors of using third party rights (TPR) instead of collateral warranties.
- Incorporation of the JCT 2012 Named Specialist Update.

The general position adopted by the JCT in relation to risk allocation has not changed. On this basis, we expect that developers and contractors will continue to negotiate amendments to the standard forms to reflect their own approach to risk. In addition, it is important for all parties switching from the 2011 edition to familiarise themselves with the new procedural requirements of the contracts, in particular in relation to payment and loss and expense claims.

Payment terms

The most significant change to all the 2016 Contracts relates to the restructuring and simplification of the payment provisions.

The main points to note are as follows:

- IVDs have been introduced, establishing a common valuation date. This is designed to speed up payments throughout the supply chain, in line with the government's Construction Supply Chain Payment Charter.
- The contracts no longer distinguish between interim payments due before practical completion (PC) and after PC. Accordingly, the period between interim certificates issued post-PC has reduced from two months to one month.
- Notified sums (plus interest) are now automatically recoverable as debts.

Common valuation dates

The un-amended 2016 Contracts establish the following multi-tiered payment regime:

- The main contract states an IVD, which applies on the same day each month (or nearest business day). The same date is written into all the subcontracts and sub-subcontracts, which themselves need to use the appropriate JCT 2016 form.
- The first IVD must now be stipulated in the contract particulars (instead of the due date for payment). If the contract particulars are not completed, then the first IVD is one month after the works commencement date and then at monthly intervals.
- Under clause 4.7 of the DBC:
 - The contractor is required to make an interim payment application in respect of each interim payment before each IVD.
 - Unless the application is late (which is dealt with in clause 4.7.3), the due dates for interim payments are then seven days after the relevant IVD.
 - Not later than five days after each due date the employer should issue a payment notice, stating the sum they consider to be/have been due at the due date. If the employer fails to do so, the contractor's application will operate as the payment notice.
- Under clauses 4.8 and 4.9 of the SBC and under clause 4 of the MWBC:
 - The contractor may (but is not required to) make an application for payment at any time up to the IVD.
 - The due date is seven days after the relevant IVD.
 - The architect/contract administrator should issue an interim certificate no later than five days after each due date, stating the sum they consider to be due to the contractor at the due date.
- If no interim certificate is issued, the contractor's application for payment will operate as the payment notice.

- As before, a pay less notice can be issued no later than five days before the final date for payment.
- Under the 2016 Contracts, the final date for payment of each interim payment and the final payment is 14 days from its due date.
- The aim of the amendments throughout the contractual chain is to allow payment to flow down to all tiers within 31 days of the IVD. Accordingly, the JCT subcontracts set the due date 12 days after the IVD, so that the main contractor is put in funds to pay the subcontractor with a five-day margin. The sub-subcontract sets the due date 17 days after the IVD, putting the subcontractor in funds to pay its sub-subcontractor with a five-day margin.

Key issues of interest in relation to the revised payment regime include the following:

- The IVD will switch from the usual date to the “nearest Business Day” when it is due to fall at the weekend or on a bank holiday. This directly affects the timing of due dates and notice dates. Parties must be careful to take this into account when calculating their monthly notices and payments.
- When amending these standard forms, parties will need to account for the multi-tiered structure of the new payment regime and follow amendments through the contractual chain.
- The recovery of notified sums as debts may open the door to recovery of costs in adjudications pursuant to the Late Payments of Commercial Debts (Interest) Act 1998.

Collateral warranties/third party rights

Most users generally delete Part 2 of the contract particulars and insert their own bespoke amendments in respect of collateral warranties from both contractors and subcontractors (and from designers under the DBC).

The changes to the 2016 Contracts acknowledge this custom and substitute the former Part 2 with “Rights Particulars”, a separate document to be prepared by the employer setting out the requirements and form of these warranties and TPR schedules.

The amendments now extend the optional provisions for collateral warranties from subcontractors to include TPR from them. Model forms are available from the JCT website. These now include:

- A net contribution clause.
- Harmonisation of the professional indemnity (PI) insurance provisions. As a result, a contractor will now receive a warranty in respect of PI insurance from its subcontractor in the same form that it gives to the employer, subject to the agreement of insurance levels.
- A default to allow a contractor or subcontractor to choose a collateral warranty or TPR in the event the contract fails to specify which is to apply.

Public sector amendments

The Public Sector Supplement 2011 relating to fair payment, transparency and BIM has been incorporated into the 2016 Contracts along with relevant provisions to reflect aspects of

the Public Contracts Regulations 2015 and the Freedom of Information Act 2000.

One of these provisions is the inclusion of express grounds for termination to reflect regulation 73 of the Public Contracts Regulations, which requires a contracting authority to have the right to terminate in the following circumstances:

- Where there has been a substantial modification to the contract (which would have required a new procurement procedure).
- If, at the time of the contract award, one of the mandatory grounds for exclusion applied to the contractor.
- If the contract should not have been awarded due to a serious infringement under EU legislation.

Changes specific to DBC and SBC

Loss and expense

The changes to the loss and expense mechanism in section 4 of the DBC and SBC are relatively minor. The JCT guidance confirms that the intention is to improve the timing and certainty of loss and expense claims.

In the 2011 editions, the contractor must notify:

“...as soon as it has become, or should reasonably have become, apparent to him that the regular progress has been or is likely to be affected.”

Under the new provisions, the duty kicks in a little earlier. Now the contractor must notify:

“...as soon as the likely effect of a Relevant Matter on regular progress or the likely nature and extent of any loss and/or expense arising from a deferment of possession becomes (or should have become) reasonably apparent to him.”

Previously, the contractor had to supply its supporting information “on request”. Now it should be submitted with the notice or “as soon as reasonably practicable thereafter”. In addition, the contractor is required to provide monthly updates “until all information reasonably necessary to allow ascertainment of the total amount of such loss and expense has been supplied”.

Time constraints are also placed on the contract administrator/architect (SBC) and the employer (DBC). They must now assess the initial claim within 28 days of receipt, and within 14 days of any subsequent update. Previously there was no time limit.

It should also be noted that, whilst the JCT guidance is silent on the issue, some commentators have spotted a change in wording that could arguably create a condition precedent to the contractor’s entitlement to loss and expense. Clause 4.20.1 (SBC) and clause 4.19.1 (DBC) state that the contractor:

“shall, subject to ... compliance with the [notice/initial assessment provisions] be entitled to reimbursement of that loss and/or expense.”

Time will tell whether parties seek to argue that a failure to comply with any of the requirements disallows the contractor’s recovery of loss and expense under the 2016 Contracts.

BIM protocol

Parties can now specifically identify a BIM protocol in the contract particulars (against clause 1.1). The following should be noted:

- Although some model BIM protocols provide that the protocol overrides the agreement/other contract documents, clause 1.3 of the 2016 Contracts (which deals with precedence of documents) has been amended slightly to ensure that the articles of agreement and conditions take precedence over any BIM protocol.
- A new clause 1.4.6 states that, where there is a BIM protocol or other protocol relating to the supply of documents or information, all references to documents in the 2016 Contracts will be deemed to include information in a form or medium conforming to that protocol.

Security provisions

The contracts include, for the first time, provision for performance bonds and parent company guarantees. The contracts require the parties to identify an agreed form.

Insurance

Option C

The main substantive change to the insurance provisions concerns Option C, which now allows more flexibility in relation to the arrangements for existing structures insurance.

The insurance required by the old Option C was not always appropriate for projects in large multi-let buildings where a landlord, rather than the tenant employer, is responsible for insuring the existing structures. Often the tenant employer could not procure a waiver of its landlord's insurer's rights of subrogation against the contractor for damage to the existing structures. Accordingly, heavy amendments were usually required to the standard form.

The new Option C allows the parties to adopt alternative arrangements to overcome these difficulties. It allows insurance of the works and existing structures by other means. If amendments are required to the default position (i.e. that the employer will insure existing structures in joint names for specified perils) as set out in paragraph C.1, then this can be replaced within a "C.1 Replacement Schedule" without amendments to the conditions.

Other changes

The amendments also consolidate the provisions relating to evidence of insurance and simply require provision of "such evidence as the other party requires".

In addition, there is now a specific right allowing either party to terminate the contract (if just and equitable) in the case of material loss or damage to an existing structure where the employer chooses not to reinstate that structure.

Issues for insurers and brokers

The biggest change for insurers and brokers results from the modifications to Option C for insurance of the works and existing structures. There is now the option to replace the existing printed C.1 with a C.1 Replacement Schedule to include

tailor-made provisions. So, what could go in a C.1 Replacement Schedule?

For smaller projects, the contractor may have sufficient public liability (PL) insurance to cover its risk in respect of existing structures and their contents (providing that the cover has no 'care, custody or control' exclusion).

However, for higher-value projects, additional layers of insurance may be appropriate, for example:

- The contractor's PL insurance up to a certain level.
- Special structures insurance taken out by an employer to cover a further level, together any exclusions in the contractor's policy.
- The landlord's insurance policy to respond at another level.

The start and finish dates of the various policies, along with the evidence of insurance, levels, excesses and beneficiaries all work to make the arrangements particularly complex. Accordingly, clients will wish to ensure that they undertake sufficient consultation at the tender stage and that insurance professionals are involved in the preparation of any replacement provisions.

In respect of the works, paragraph C.2 requires a joint names policy for all risks insurance on the same basis as under Option B. In the case of existing structures and contents, the employer may have, and will wish to retain, all risks cover rather than the more limited specified perils cover (which needs to be afforded to the contractor). Insurers will need to consider whether full all risks cover is then extended to the contractor.

In addition, in certain circumstances insurers may wish to consider extending a policy for a contractor's works under Option A to cover existing structures where these are limited to a building shell or façade and have substantially less value than the works. This type of benefit for insureds would be a selling point in their tenders and would make them more competitive in certain markets.

There are some other minor structural changes to the insurance provisions but nothing of substance and the definitions all remain the same.

Insurers and brokers should be aware that all cover required by the JCT Contracts should be discussed and agreed between the parties and their insurance advisors at tender stage.

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